No. 84-1044

In the Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et.al.,
Appellees.

On Appeal from the Supreme Court of California

Brief of Amicus Curiae State of Oregon In Support of Appellee Public Utilities Commission of the State of California

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
RICHARD D. WASSERMAN
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Council for Amicus Curiae
State of Oregon

*Counsel of Record

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The State of Oregon, through its Attorney General, appears as *amicus curiae* in support of appellee California Public Utility Commission (CPUC or commission) to protect the *interests of the Oregon electorate*. By initiative legislation, the voters of Oregon have required the state's privately owned public utilities to include materials prepared by a simultaneously created consumer interest group in their customer billings. This voter-initiated requirement parallels the CPUC order that the appellant utility here claims violates its First Amendment rights. This popular mandate similarly is being challenged by an association of telephone utilities and by corporations providing gas and telephone service to Oregonians in a federal district court action for declaratory and injunctive relief (*Oregon Independent Telephone Ass'n, et al. v. Citizens' Utility Board of Oregon*, U.S. Dist. Ct. (Or.), Civil No. 85-875).

Oregon's voters thus have a significant stake in the proper resolution of the constitutional question presently before the Court. A comprehensive legislative program, recently adopted by the electorate to foster public awareness and involvement in issues relating to public utility regulation, is at risk. An essential feature of that program, *i.e.*, limited public access to utility bill mailings, erroneously has been called into constitutional question.

On November 6, 1984, the people of the State of Oregon, exercising the initiative power reserved to them by Or. Const. art. IV, § 1, created Oregon's Citizens' Utility Board (CUB) to

serve particular public interests. By this enactment, the voters expressly found

> that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests, that utility consumers have the right to form an organization which will represent their interests before legislative, administrative and judicial bodies, and that utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being.

Oregon Official 1984 General Election Voters' Pamphlet 9 (1984).

The Oregon CUB was designated an "independent non-profit public corporation"[1] possessing

> all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:
>
> (a) To conduct, fund or contract for research, studies, plans, investigations, demonstration projects and surveys.
>
> (b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

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[1] Contrary to the contention of *amici curiae* Pacific Northwest Bell Telephone Company, Pacific Power & Light, and Oregon Independent Telephone Association the participation of the Oregon Attorney General in this proceeding does not suggest "that all CUB actions (unlike TURN actions) are in fact actions of the state." *See* Brief of *amici curiae* Pacific Northwest Bell Telephone Company *et al.* at 2 n. 2. The Attorney General appears here only on behalf of the State of Oregon to represent the interests of its citizens as embodied in Oregon's CUB law. In the above-referenced local litigation challenging the constitutionality of Oregon's CUB law, CUB currently is represented by privately retained counsel.

Id.

The CUB law encourages broad consumer membership and involvement in the organization. Every Oregon resident 18 years of age or older is eligible for membership in the CUB upon contribution of at least $5 but no more than $100 per year to the CUB. The Citizens' Utility Board of Governors is directed to establish a method whereby economically disadvantaged individuals may become members without full payment of the yearly contribution. *Id.* at 9, 10. Initially, the Oregon CUB is managed by an interim board of directors appointed by the governor and subject to confirmation by the Oregon State Senate. After membership reaches 5,000, with a minimum of 100 members in each state congressional district, the members shall elect a board of governors, who are subject to recall by the members. *Id.* at 9, 10.

Under section 10, the most pertinent provision of the measure passed by Oregon's voters, each utility is required upon the CUB's request to include in its billings to utility consumers materials prepared and furnished by the CUB that conform in size to the dimensions of the utility's customary billing envelope. No utility may, however, be required to include CUB materials in its mailings more than six times per calendar year, or with less than 30 days' notice from the CUB. The CUB must reimburse the utility for a pro rata share of the postage charges for materials submitted by the CUB that exceed four-tenths of one ounce avoirdupois. The CUB must also reimburse the utility for other reasonable costs the utility incurs in complying with the act. *Id.* at 10.

Oregon's CUB law does not provide for any comprehensive state review of the materials submitted by the CUB to utilities. A utility may complain to the Public Utility Commissioner of Oregon that the CUB intentionally has made a material false statement in messages submitted to a utility for inclusion with a billing. The commissioner's sole authority in that circumstance is to review the complaint expeditiously and, upon determining that the CUB intentionally has made a material false statement, to notify the Citizens' Utility Board of Governors in writing of the false statement and the reasons why the commissioner determines the statement to be false. *Id.*

Utilities and their officers, employees, and agents are prohibited from interfering with the distribution of CUB materials in periodic utility billings, and from interfering with the right of utility consumers to contribute to the CUB. In addition, no utility may change its mailing, accounting, or billing procedures if the change will interfere with the CUB's ability to distribute its materials. These prohibitions are enforceable by criminal sanctions, as well as by equitable remedies. *Id.* at 10, 11.

Correlative to its authority to submit written materials for inclusion by utilities in periodic billings, the Oregon CUB has the power to intervene as of right or otherwise to participate in any agency proceeding whenever its board of governors determines that the agency proceeding may affect the interests of utility consumers. The CUB has standing to seek judicial or administrative review of agency action, and to intervene or

otherwise to participate in any proceeding for review or enforcement of an agency action where the board of governors determines that the action may affect the interests of utility consumers. *Id.* at 10, 11.

The voters of Oregon thus created a mechanism whereby, through an effective advocate with convenient access to consumer funding, utility consumers may participate before legislative, administrative, and judicial bodies in the creation of public policies affecting the quality and price of utility services so that those policies reflect their needs and interests. To forestall legal challenges that impede implementation of this program, the State of Oregon appears *amicus* to make a fundamental point: A state requirement that a public utility include consumer materials in periodic billings, as provided by CPUC's order under review and by Oregon's CUB law, does not implicate, much less violate, the utility's First Amendment freedoms.

SUMMARY OF ARGUMENT

The California requirement that its public utilities afford a certain consumer group periodic access to utility billing envelopes for dissemination of solicitational and informational messages does not abridge, in any constitutionally significant fashion, a public utility's freedom of speech. Neither the communicative nor the associational aspect of that First Amendment guarantee is implicated by the requirement. Appellant Pacific Gas and Electric's (PGandE) claims of speech infringement do not pass threshold analytical hurdles.

The CPUC's order does not detract from PGandE's free-om to communicate with its customers through the monthly billing envelope, whether or not material of Toward Utility Rate Normalization (TURN) is inserted in the envelope and regardless of the weight of TURN's inserts. The commission's order is neutral as to the content, subject matter, and amount of the utility's speech. The order merely gives rise to the possibility that PGandE may be deprived of free postage to distribute its message through its publication, *Progress*, a maximum of four times each year; yet PGandE itself concedes that this is not a deprivation of constitutional significance. Moreover, under its order, the commission will play no role in selecting, reviewing, or endorsing the content either of PGandE's or TURN's speech that appears in the billing envelope.

In addition, PGandE's contention that the commission indirectly and unconstitutionally will select the content of speech by selecting the speaker rests on a premature and ironically self-defeating assumption about the content of the consumer-oriented materials, and on PGandE's misinterpretation of the CPUC's order. Contrary to PGandE's contention, the CPUC's order does not conclude that the content of TURN's speech is better than that of PGandE's speech, or that TURN's speech should replace PGandE's speech in the billing envelope. Rather, by allowing TURN's message to appear alongside PGandE's message, the commission acted consistently with the First Amendment goal to encourage the expression of a variety of views, rather than only a single view, to aid the common search for truth.

The CPUC's order does not limit PGandE's rights to abstain from associating with the views of another or to refrain from disassociating itself from another's message. That order does not compel PGandE to contribute financial support for the dissemination of ideological views it finds repugnant. Nor does the order impair PGandE's freedom to hold its beliefs and act in accord with its corporate views. The commission's order does not create a possibility for confusion about the identity of the sponsors of the different messages that will appear in the billing envelope, thereby indirectly inhibiting PGandE's freedom to speak. The unambiguous disclaimer that the CPUC directed TURN to place on all its materials forecloses that risk. Nor does the commission's order, by making a PGandE billing a vehicle for distributing TURN's message, control or affect PGandE's editorial judgment with respect to the content of *Progress*. The order fosters, rather than discourages, the free discussion of public affairs. PGandE's simplistic reliance on dictionary definitions and on merely physical concepts of association trivializes, rather than vindicates, the commands of the First Amendment. Those standards are not contravened in this case.

ARGUMENT

I. Introduction

Appellant PGandE, supported by several utilities and others appearing *amici curiae*, advances an assortment of arguments to sustain its claim that the CPUC order allowing TURN to include materials four times a year in PGandE's billing envelope violates PGandE's freedom of speech. This

brief does not address the multitude of points and sub-points raised by PGandE and its supporters because this case can be resolved more simply. Utility accommodation of state-required consumer access to utility billing envelopes, under the circumstances presented here, does not abridge the utility's freedom of speech in either the communicative or the associational sense. This case can be resolved against PGandE at the analytical threshold.

II. The CPUC's order does not infringe upon PGandE's right to speak to its customers in the billing envelope and, therefore, does not implicate First Amendment values.

PGandE relies upon the fundamentally insupportable notion that the CPUC's order limits its ability to speak to its customers through its monthly billing envelope. The commission's order does not restrict the amount, subject matter, or content of the utility's speech.

PGandE wrongly asserts that the amount of its speech is limited notwithstanding that PGandE obviously remains wholly free to communicate with its customers through the billing envelope each month of the year, whether or not TURN's material is inserted in the envelope and regardless of the weight of TURN's inserts. The CPUC's order merely means that on those occasions when TURN's materials, together with *Progress* and the legally required billing and other notices, weigh over one ounce, PGandE would be required to pay for the cost of mailing *Progress* to its customers.

PGandE correctly concedes that the First Amendment does not entitle it to disseminate its message to its customers for free. Appellant's Brief at 39. *See U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 127 & n. 5 (1981). *Cf. Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545-46 (1983) (rejecting the proposition that First Amendment rights are not fully realized unless party's speech is subsidized by the state). The possibility that PGandE might lose its "free ride" in the billing envelope is not constitutionally objectionable; PGandE's ability to speak is not otherwise limited. Therefore, PGandE has shown no constitutionally cognizable restriction on its right to speak.

Nor does the commission's order affect the subject matter of PGandE's speech. PGandE's claim of communicational infringement at bottom rests on a distorted reading of this Court's decision in *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980). That decision does not support an argument that PGandE is entitled to monopolize the space in its billing envelope. In *Consolidated Edison*, the New York Public Service Commission had prohibited utilities from inserting in monthly billing envelopes materials discussing controversial issues of public policy. The Court observed:

> This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." [citations omitted] In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question

> and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

Consolidated Edison, 447 U.S. at 534-35. In contrast to *Consolidated Edison*, the CPUC's order here in no manner "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. As already noted, the order leaves PGandE entirely free to communicate to its customers through its billing envelope as frequently as it desires, without regard to the subject matter or content of its messages. Unlike the New York commission's order in *Consolidated Edison*, therefore, the CPUC's order does not restrict PGandE's freedom to speak.

Further, PGandE erroneously contends that the commission's order strays from its "paramount obligation" to maintain government neutrality toward the content of protected communications. *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976). Appellant's Brief at 22. Appellant acknowledges that its contention concerning the CPUC's role in determining the content of the communications in the billing envelope flies in the face of the express language of the CPUC's order. *See* Appellant's Brief at 22-23. The order provides both that "PG&E and TURN shall each determine the content of its own material," and "All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." Motion to Dismiss of Appellee CPUC

(M.D.) at A-38, A-39. Plainly, the CPUC will exercise no content control over the messages in the billing envelope.

PGandE insists, however, that by granting TURN periodic access to the billing envelope, the CPUC has indirectly and unconstitutionally chosen the permissible content of the inserts by choosing the speaker. Appellant, and the utilities supporting appellant as *amici curiae*, assume that the views of TURN will be "hostile to the utilities' interests." Brief of *amici curiae* Pacific Northwest Bell *et al.* at 3. The assumption is blatantly premature. It also necessarily requires the conclusion that the utilities' interests are unremittingly hostile to those of their customers, an impression that utilities devote enormous amounts of resources annually to dispel. Further, PGandE's argument misconstrues the commission's goal "to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit [because] [i]t is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." M.D. at A-22. That statement does not, as PGandE would have it, "weigh the value of TURN's speech against PGandE's speech, or . . . make [a] . . . determination that TURN's messages would be a more efficient use of the envelope extra space." Appellant's Brief at 23. Rather, the CPUC has, without regard to the content of TURN's speech, which it will neither review, control, nor endorse, acted upon the fundamental assumption underlying the First Amendment that the airing of a variety of views,

rather than only one view, is the road to the eventual discovery of the truth:

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., supra, 418 US, at 339-340, 41 L Ed 2d 789, 94 S Ct 2997 (footnote omitted).

Bose Corp. v. Consumers Union of U.S., Inc., ___ U.S. ___, 80 L Ed2d 502, 518 (1984). *See also Consolidated Edison*, 447 U.S. at 326.[2]

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[2] PGandE warns that by allowing TURN access to PGandE's billing envelopes, the CPUC has placed itself in the position of selecting and licensing speakers to use the billing envelope: A position rife with potential First Amendment problems. Appellant's Brief at 23-27. Appellant's claim is premature. First, the CPUC chose TURN, not from among competing applicants for the extra space in the billing envelope, but because TURN "is the only organization which has sought access to the PG&E billing envelope." M.D. at A-35. Thus, this case does not present the problem PGandE raises. If the problems foreseen by PGandE arise in the future, the CPUC may attempt to formulate a constitutionally neutral method for allocating space in the billing envelope. As the commission stated:

> Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

M.D. at A-24. Finally, it seems plain that groups unsuccessfully seeking access to the billing envelope, not PGandE, would have standing to challenge such an order by the CPUC.

In sum, PGandE's argument proceeds from a basic distortion of the commission's order. That order does not, as appellant maintains, limit PGandE's speech or substitute TURN's speech for that of PGandE. The order merely places TURN's speech side by side with PGandE's speech. Appellant's stance reveals the essence of the problem here; PGandE, and the other utilities appearing as *amici curiae* in support of PGandE, do not explore the core of First Amendment values. Rather, they seek to be allowed to speak in the public marketplace of ideas, free from the competition of other messages. The CPUC's narrowly drawn order, not PGandE's position, embodies the principles at the heart of the First Amendment.

III. The CPUC's order does not abridge PGandE's rights to refrain from associating with the views of another or from disassociating itself from another's message.

PGandE relies on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for the proposition that the CPUC's order unconstitutionally compels PGandE to speak and to associate with the speech of others. Those cases provide no support for appellant's argument.

Abood involved the constitutionality of a Michigan state law concerning union representation of local government employees. Under that law, through an agency-shop arrangement every employee represented by a union, whether or not a

union member, could be required to pay the union a service fee equal in amount to union dues. In *Abood*, this Court held that the First Amendment bars a state from requiring an individual to contribute financially to the support of an ideological cause he may oppose. *Abood*, 431 U.S. at 234. That holding was premised on the principle that the freedom of belief is "at the heart of the First Amendment." *Id.* This case bears no similarity to *Abood*. PGandE is not compelled in any fashion to contribute to the support of ideological causes it finds repugnant; the CPUC's order expressly requires TURN to reimburse PGandE "for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." M.D. at A-39. Moreover, even if a corporation may properly be said to hold "beliefs," PGandE's freedom of belief remains unimpaired by the CPUC's order.

The "association" with TURN's views that PGandE finds so objectionable is merely physical; at most four times each year PGandE's *Progress* may be required to share space with TURN's materials. That mere physical proximity is not the compelled "association" found to violate the First Amendment in *Abood*. There, it was the compulsion to contribute financial support to ideological causes one opposes, thereby preventing individual action based upon individual mind and conscience, that rendered the Michigan law infirm. *Abood*, 431 U.S. at 235. PGandE thus misapplies the rationale of *Abood* and thereby trivializes the First Amendment principles announced in that decision.

Further, physical sharing of the envelope does not imply PGandE's endorsement of TURN's views. The commission explained:

> [I]n order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

M.D. at A-28. The commission's recognition of the efficacious use of disclaimers is supported by this Court's decision in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Pruneyard*, this Court ruled that state constitutional provisions that permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited do not violate the owner's right to free speech under the First and Fourteenth Amendments. Addressing the possibility that the views expressed by members of the public passing out petitions on the owner's property could be identified with those of the owner, the Court stated:

> [A]s far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Pruneyard, 447 U.S. at 87. Hence, contrary to PGandE's assertion, it is not "highly likely that the public will receive a mistaken impression that the State's selection of TURN to

send its message in the billing envelope is supported by PGandE." Appellant's Brief at 19. PGandE's contention that a disclaimer as required by the CPUC would be ineffective, *id.*, is unfounded. This disclaimer also negates any potential for dilution of PGandE's message arising from the simultaneous presence of TURN's mailer. *See* Appellant's Brief at 13-14 n. 11.

Moreover, PGandE's argument that the disclaimer itself would be unconstitutional is meritless. That argument rests on PGandE's mistaken representation that the disclaimer "would force PGandE to speak even though it prefers to remain silent," (Appellant's Brief at 19), echoing Justice Powell's concerns expressed in *Pruneyard*, 447 U.S. at 99 (Powell, J., concurring). The CPUC's order to include a disclaimer was, however, directed at TURN, not at PGandE (M.D. at A-28, A-39); PGandE is not required to speak at all. In any event, appellant's misleadingly selective quotation of Justice Powell omits the premise for his concern: The likelihood that listeners will identify the views of the party granted access with the views of the one forced to grant access. *See Pruneyard*, 447 U.S. at 99 (Powell, J., concurring). As already explained, TURN's mandated disclaimer removes that potential for confusion. Further, *Pruneyard*'s sanction of a disclaimer by the owner of the shopping center to avoid confusion resolves the First Amendment issue against PGandE.

Justice Powell also cautioned that those granted access may "express views that are so objectionable as to require a response even when listeners will not mistake their

source," *Pruneyard*, 447 U.S. at 101 (Powell, J., concurring), thereby burdening "the right to control one's own speech." *Id.* at 100. PGandE does not allege, however, that TURN will express views so repugnant to its own as to require an answer even when its customers will not confuse their source. Consequently, here as in *Pruneyard* the facts do not raise the issue that troubled Justice Powell.

Nor is *Wooley v. Maynard* helpful. There, the Court ruled that the State of New Hampshire could not constitutionally require an individual to display its state motto, "Live Free or Die," on an automobile license plate. The law at issue there was abhorrent to the First Amendment because it

> force[d] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the state "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Wooley v. Maynard, 430 U.S. at 715, *quoting from Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Again, and contrary to PGandE's contention, the CPUC's order does not force PGandE to advocate or foster public adherence to a point of view it finds objectionable, and does not invade PGandE's "sphere of intellect and spirit," *Wooley v. Maynard*, 430 U.S. at 715. PGandE remains at liberty to hold and advocate whatever views it chooses, and to disassociate itself, financially and intellectually, from views it finds distasteful.

Finally, nothing in *Miami Herald Publishing Co. v. Tornillo* aids appellant. This Court's decision there invalidated on First Amendment free press grounds a Florida law that

required newspapers to publish the replies of political candidates whom they had criticized. That law violated the First Amendment because it intruded into the "exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. In so doing, the statute threatened to stifle editorial comment by encouraging newspaper editors to steer the safe course and avoid controversy. That threat struck at a major purpose of the First Amendment: To "protect the free discussion of governmental affairs." *Id.* at 257, *quoting from Mills v. Alabama*, 384 U.S. 214, 218 (1966).

PGandE's reliance on *Tornillo* rests on its simplistic, mechanistic application of a dictionary definition of the term "publish." *See* Appellant's Brief at 16 n. 13. Appellant thus misses the meaning of *Tornillo*. That case did not involve the newspaper as "a passive receptacle or conduit" for the dissemination of written matter, *Tornillo*, 418 U.S. at 258, as PGandE is under the CPUC's order. Rather, this Court stressed:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id. The commission's challenged decision here does not purport to control or affect PGandE's "editorial control and judgment" over the content of *Progress*. Nor, plainly, will the inclusion of TURN's material in the utility's billing envelopes frighten PGandE into silence, thereby limiting debate on

issues of public importance; PGandE does not contend otherwise. Instead, the commission's order will foster the "First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Consolidated Edison*, 447 U.S. at 541, *quoting from First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

CONCLUSION

Neither Oregon's voter-initiated Citizens' Utility Board legislation, nor CPUC's order requiring PGandE to allow a consumer group limited access to its billing envelopes, abridges a public utility's freedom of speech. The order appealed from should be affirmed.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
RICHARD D. WASSERMAN
Assistant Attorney General
Counsel for Amicus Curiae